

Supplemental Letter of Findings: 09-0764
Gross Retail Tax
For 2006, 2007, and 2008

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ISSUES

I. Overhead Bridge Cranes – Gross Retail Tax.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-5-8; IC § 6-2.5-8-8; IC § 6-8.1-5-1; [45 IAC 2.2-8-12](#); Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988).

Taxpayer argues that it was not required to collect tax on the sale of two bridge cranes to a Michigan customer.

II. Equipment Sales – Gross Retail Tax.

Authority: IC § 6-8.1-5-1.

Taxpayer maintains that transactions involving a Camaro, an engine, forklift, "roller," electric truck, air compressor, and a Freightliner dump truck were not "retail sales" subject to sales tax.

III. Exemption Certificates.

Authority: IC § 6-2.5-8-8; IC § 6-8.1-5-1.

Taxpayer states that it can produce exemption certificates establishing that it was not required to collect sales tax on the sale of a "Grain Bed Truck," on the sale of a W-18 loader, and on the sale of an engine.

IV. Computational Changes – Gross Retail Tax.

Authority: IC § 6-2.5-7-2; IC § 6-8.1-5-1.

Taxpayer argues that the audit report contains certain errors which should be corrected.

V. Ten-Percent Negligence Penalty.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer asks that the Department exercise its authority to abate the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a C corporation which sells heavy equipment, vehicles, trailers, forklifts, backhoes, trucks, buses, and other similar, related equipment. Taxpayer operates from two Indiana locations. Both locations are registered with the Bureau of Motor Vehicles as "authorized" dealers.

The Department of Revenue (Department) conducted an audit review of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional sales/use tax. Taxpayer disagreed with portions of the assessment and submitted a protest to that effect.

The Department previously issued a Letter of Findings denying Taxpayer's protest except with regard to one transaction. Taxpayer requested a rehearing regarding the protest, which the Department granted. This Supplemental Letter of Findings results.

I. Overhead Bridge Cranes – Gross Retail Tax.

DISCUSSION

In 2006, Taxpayer sold two overhead bridge cranes to a Michigan customer. The invoice indicates that Taxpayer was paid \$41,000 for the cranes but that the "Customer will provide Tax Exemption information prior to close of this sale."

Taxpayer indicates that the sale was "cancelled" and that the Michigan business resold the cranes without having taken delivery. The cranes were then resold to an Alabama company.

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

Although Taxpayer admits it received by wire transfer \$41,000 for the two cranes, it argues it was not required to collect sales tax because the Michigan customer can verify the transaction was exempt. Indeed, Taxpayer has provided a statement from the customer indicating that, "Under the laws of the state of Michigan, I am exempt from sales tax on my purchase." In addition, Taxpayer asserts that Michigan does not issue exemption certificates.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests

with the person against whom the proposed assessment is made."

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

Taxpayer provided a copy of a Michigan Dep't of Treasury Form 3372 signed by the Michigan customer. However, the issue is irrelevant because this was not a Michigan transaction. The sales occurred in Indiana and Indiana law requires as follows:

A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax.

The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase. IC § 6-2.5-8-8(a). (**Emphasis added**)

Taxpayer makes a secondary argument. Taxpayer argues that the sale to the Michigan customer was reversed and that the equipment was sold to an Alabama customer which was purportedly exempt from Indiana sales tax on the ground that Taxpayer shipped the cranes to the Alabama location. However, whether or not the sale to the Alabama customer was or was not exempt is entirely irrelevant because the Department did not assess tax on this particular transaction; the Department assessed tax on the sale to the Michigan customer.

Because Taxpayer did not receive an exemption certificate "on forms and in the manner prescribed by the department," [45 IAC 2.2-8-12](#)(d) provides that a retail merchant "must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose." Taxpayer has provided sufficient information to conclude that the cranes were purchased by the Michigan customer for resale—an exempt purpose under IC § 6-2.5-5-8. Therefore, Taxpayer's protest is sustained.

FINDING

Taxpayer's protest is sustained.

II. Equipment Sales – Gross Retail Tax.

DISCUSSION

The audit review found that Taxpayer sold its single shareholder cars, equipment, and a truck but that no sales tax was collected. Taxpayer argues that these sales were booked incorrectly because the items were actually given by the shareholder to Taxpayer. According to Taxpayer, "These items were never taken from [Taxpayer's] inventory, simply used to adjust large note balance and show the bank [shareholder] held some collateral against notes." Elsewhere in the written protest, Taxpayer states that shareholder "never removed the asset from [Taxpayer's] inventory, but simply added the money to his loan and in exchange kept the [vehicle] listed as collateral to satisfy the bank that [shareholder] has some collateral against loans to [Taxpayer]." Taxpayer further explains that each sale "was written as an alternative means of lending money to [Taxpayer] without having it get 'lost' in the course of doing business and never repaid. By charging a specific vehicle against the money, the item was held by [shareholder] until sold and then it's put back on the books, the sale registered through [Taxpayer] and sales tax collected when applicable."

At rehearing, Taxpayer explained its operations and how it related to the transactions in question. Taxpayer had significant financial problems and was unable to purchase certain items. Taxpayer's shareholder purchased the items in question from vendors. Taxpayer would in turn treat the merchandise in question as being loaned to the company, with a corresponding increase in notes payable. The merchandise was treated as inventory by Taxpayer. The invoices were an attempt by Taxpayer's bookkeeper—the shareholder's wife—to indicate what he had loaned to the corporation because of the bookkeeper's concern over Taxpayer's financial status. Taxpayer further provided corrected accounting entries reflecting an increase in inventory (asset) and notes payable to the shareholder (liability).

While Taxpayer's prior accounting system for these equipment sales was not a proper system, Taxpayer explained the proper transaction and corrected the transaction in its books. Based on the explanation provided by Taxpayer and the information corroborating the explanation, Taxpayer has met its burden of proof under IC § 6-8.1-5-1(c). Thus, Taxpayer's protest is sustained.

FINDING

Taxpayer's protest is sustained.

III. Exemption Certificates.

DISCUSSION

Taxpayer argues that it can provide exemption certificates and that these certificates should be accepted by the Department.

As noted previously, Taxpayer has "[t]he burden of proving that the proposed assessment is wrong...." IC § 6-8.1-5-1(c).

[IC 6-2.5-8-8](#)(a) describes sales tax exemption certificates:

A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax.

The person shall issue the certificate on forms and in the manner prescribed by the department. A seller

accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

Taxpayer has produced one exemption certificate purportedly received from the purchaser of a "1977 GMC Grain Bed Truck." However, the Department's certificate plainly indicates that **"This exemption certificate can not [sic] be issued for the purchase of Utilities, Vehicles, Watercraft, or Aircraft."** (Emphasis in original). However, the 1977 GMC Grain Bed Truck does not appear to have been assessed in the audit.

At rehearing, Taxpayer produced a second exemption certificate related to the sale of a "Cummins Engine" and a third exemption certificate related to the sale of a "Case W-18."

At the original hearing, Taxpayer provided sufficient information to establish that it properly accepted an exemption certificate covering the sale of the Cummins Engine. Taxpayer has provided sufficient information to conclude that it accepted an otherwise valid exemption certificate on the sale of the Case W-18.

FINDING

Taxpayer's protest is sustained with regard to the sales tax imposed on the Cummins Engine and the Case W-18.

IV. Computational Changes – Gross Retail Tax.

DISCUSSION

A. Previously Unlisted Items.

Taxpayer argues that the audit contains certain computational and procedural errors. Taxpayer suggests that certain audit items "appeared post audit were not on the original list presented to the taxpayer." However, in a memo submitted following Taxpayer's original protest, the auditor notes that all the items were sent to Taxpayer's representative "before the audit was finally written and turned in."

Under IC § 6-8.1-5-1(c), Taxpayer has the burden of demonstrating that the items in question were erroneous. For these items, Taxpayer has not provided sufficient information to show that the Department's assessment was incorrect.

B. Cross-Reference Issues.

Taxpayer protests the inclusion of two items listed in the audit report. The audit indicated particular items by purchases date and a cross-reference—usually a credit card account. However, Taxpayer asserts that the items were not purchased by it.

The credit card statements do not list the purchases in question. The Department requested other credit card statements to verify if the audit report mistyped the cross reference or if the purchases in question had not occurred. Taxpayer provided the relevant credit card statements needed to verify its claims. In the case of a receipt to "Rural King" for \$65.20, the cross-reference was erroneous; however, the item was listed on another credit card statement. Taxpayer has not otherwise provided sufficient legal and factual grounds to substantiate whether the purchased items were not subject to sales tax. With regard to this receipt, Taxpayer's protest is denied.

For a "Pilot Travel Centers" receipt for \$141.29, the item is not listed on the relevant credit statements. Thus, Taxpayer has provided sufficient information to sustain the protest on that receipt.

C. Incorrect Amount Listed.

Taxpayer protests that, for four truck diesel invoices, the incorrect amount was listed in the Department's audit. Taxpayer has provided sufficient documentation to show that the lower amount should be included for purposes of the assessment.

D. Tax Included in the Listed Price.

Taxpayer protests the inclusion of several truck diesel fuel purchases. In particular, Taxpayer protests that "sales tax was included in the purchase price," as is normal practice under IC § 6-2.5-7-2. The receipts themselves listed an "adjustment to fuel price" of an amount roughly equal to 4.8 percent of the total fuel price.

Taxpayer was asked to provide an explanation of this adjustment. Taxpayer explained that, under the fuel seller's normal procedures, sales tax was charged unless the fuel station was provided certain information not listed on the receipts. Taxpayer further provided information that the item listed was actually a frequent purchaser discount from the company. Based on the information provided, Taxpayer's protest is sustained on this issue.

E. Duplicate Items.

Taxpayer protests the inclusion of one item that it claims was a duplicate of another item listed in the audit report. Taxpayer has provided sufficient information to conclude that the item was listed twice and therefore is sustained on this issue.

F. Purchases on Behalf of an Affiliated Company.

Taxpayer protests the taxability of several items, listing the sales as purchases of an affiliate. Taxpayer used its credit cards to purchase the items in question on behalf of the affiliate. However, Taxpayer has not provided sufficient legal or factual grounds to conclude that the Department's assessment was incorrect.

FINDING

Taxpayer's protest is sustained with respect to subissues (C), (D), and (E). Taxpayer's protest is sustained in part and denied in part with regard to subsection (B). Taxpayer's protest is otherwise denied.

V. Ten-Percent Negligence Penalty.

DISCUSSION

Taxpayer believes that it is entitled to abatement of the ten-percent negligence penalty because the "taxpayer paid all sales tax using the best information available to do so and had no willful intent to under report any sales or use tax with the department."

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence.

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation [45 IAC 15-11-2](#)(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation [45 IAC 15-11-2](#)(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer," Taxpayer has provided sufficient evidence to conclude that it acted with ordinary business care for the tax years in question. However, in the event of a future audit, the Department may be less willing to waive penalties based on the issues discussed in the audit and this Supplemental Letter of Findings.

FINDING

Taxpayer's protest is sustained.

SUMMARY

Taxpayer is sustained on the issues discussed in Issues I, II, III, and V. Taxpayer is sustained on Issues IV(C), IV(D), and IV(E). Taxpayer's protest is sustained in part and denied in part with regard to Issue IV(B). Taxpayer's protest is denied on Issues IV(A) and IV(F).

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